IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 364 of 1999

in

SPECIAL CIVIL APPLICATION No 5435 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL Sd/-
and
Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES YES

2. To be referred to the Reporter or not? YES :

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO NO

5. Whether it is to be circulated to the Civil Judge? : NO NO

BHAVNAGAR MUNICIPAL CORPORATION

Versus

KUMAR G MEHTA

Appearance:

MR SN SHELAT ADDL AG with JM BAROT for Appellant
MR RK MISHRA for Respondent No. 1
MR HASMUKH PATEL for Respondent No. 2

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE D.H.WAGHELA

Date of decision: 02/03/2000

ORAL JUDGEMENT (Per B.C.Patel, J.)

Being aggrieved by the order passed by the learned Single Judge in Special Civil Application No.5435 of 1986 on 11.2.1999, the original respondent No.2 - Bhavnagar Municipal Corporation has preferred this appeal.

2. From the facts set out in the petition it appears that the president of the union has filed the petition representing the case of safai kamdars working with the respondent No.1. Respondent No.1- Gujarat Housing Board is constituted under the Gujarat Housing Board Act, 1961. It is necessary to consider the statement of Objects & Reasons of the Act, which are as under:

" The operation of Gujarat Housing Board being restricted within the limits of a city as constituted under the Bombay Provincial Municipal Corporations Act, 1949, and a Municipal Borough or notified area as constituted under the Gujarat Municipalities Act, 1963, where on account of rapid urbanisation, vacant land has become scare, the work of the construction of houses by the Board has gradually lessened. In order to enable the Board to promote increasing number of housing schemes and for that purpose to obtain greater financial assistance from institutions like Housing and Urban Development Corporation, it is considered necessary to extend its operation to areas contagious to the city, Municipal Borough and notified area, to nagars as constituted under the Gujarat Panchayats Act, 1961 alongwith their peripheral area of three kilometers and to the development area and urban development areas declared under the Gujarat Town Planning and Urban Development Act, 1976. This Bill seeks to amend the Gujarat Housing Board Act, 1961 to achieve the aforesaid object."

2. Respondent No.2 has been joined as a party-respondent, namely, Bhavnagar Municipal Corporation. The said Corporation functions under the provisions contained in the Bombay Provincial Municipal Corporations Act, 1949. So far as the Gujarat Housing Board is concerned, the Chairman of the Board as well as Members are appointed by the State Government. So far as the Bhavnagar Municipal Corporation is concerned, it is a local authority, the functions of which depend on the

elected councillors from the constituencies of the Corporation. The Corporation consists of councillors chosen by direct election and it is these members of the Corporation who are members of the Standing Committee and the Transport Committee looking after the local problems in the manner laid down in the Bombay Provincial Municipal Corporations Act. There are various other committees besides the Standing Committee and the Transport Committee. The servants of the Corporation are appointed under that Act. Duties and powers are specifically mentioned in Chapter VI of the Act. So far as the properties are concerned, there is Chapter VIII which takes care of the properties of the municipality. For the management, there is a municipal fund and special funds. The Municipal Corporation is entitled to levy taxes on the property. There is a special provision relating to water and conservancy tax, tax on vehicles, roads and animals. For the health of the public, the Municipal Corporation is required to look after the drains and drainage. It has to see that there is supply of water to the people residing in the municipal area. Streets which are vesting in the Corporation are to be maintained and are to be improved by the Corporation. It is the duty of the Corporation to see that public streets are lighted. There are building regulations, provisions for fire-brigade and sanitation. Thus, considering the provisions of the Act, it is clear that within the area covered by the Municipal Corporation, certain duties are cast on the Corporation and the Members duly elected by the citizens. Voters are electing their councillors and it is through such councillors the common problems of the citizen are to be considered.

3. So far as the Housing Board is concerned, it is constructing houses for a class of people and is responsible for maintaining the houses. It has to supply other facilities as mentioned in the Act. From the provisions it becomes clear that the Municipal Corporation is quite independent from the State Government. The Housing Board is also a statutory Board. It has nothing to do with the Corporation. This aspect cannot be lost sight of.

4. The case of the respondent No.1 herein, as it appears from the petition, is that the petitioners worked as safai kamdars with the Gujarat Housing Board. They joined services of the Housing Board from 1973 to 1978. There is a reference in the petition that some persons approached the Labour Court through the trade union by filing Reference (LCD) No.94/80 and the industrial dispute came to be decided by the Labour Court at Rajkot

by its award dated 5.11.1984. As contended in the petition, the Labour Court directed that these persons be appointed on regular basis in regular pay scale of Rs.196-232 with effect from 1.1.1984. It is contended that all the benefits available to the staff members of the Gujarat Housing Board were being granted to the petitioners. It is averred in the petition that the Housing Board by a Resolution dated 29.10.1983 accepted the proposal vide Annexure-E. (Annexure-E is not available on the record, but we find the proposal and acceptance at page 15 of the paper-book). Reading the same, it appears that it is a resolution passed by the Corporation to take over the housing colony of the Gujarat Housing Board situated at Nari Road along with civil amenities of the same colony by accepting Rs.10 lakh at a time well in advance without any conditions. It is contended that, later on, the Corporation agreed to implement the resolution with effect from 1.10.1986.

5. Names of the safai kamdars are mentioned in Annexure-A who were served with notice dated 25.9.1986. The author of the said notice is 'Gujarat Housing Board' through its Executive Engineer. By that notice it was pointed out that the workman is working as 'work-charge workman' at Nari Road Colony. As the workman was rendering service from 30.9.1986, he was retrenched from 1.10.1986. Similar notices were issued to all persons who are referred in Annexure-A. From the said notice it is also clear that, as mentioned in Section 25-F of the Industrial Disputes Act, amount was offered. However, as the same was not accepted, the same was forwarded by registered letter. There is no dispute about this aspect. In the petition, it was prayed that termination of services of the persons mentioned at Annexure-A to the petition may be declared illegal, unconstitutional, without jurisdiction, null, void and of no effect whatsoever. It was further prayed that the persons mentioned at Annexure-A should be treated to have continued in service as if their services were not terminated, by any written order or otherwise, and whatever benefits which they are entitled to should be granted to them. It is averred in the petition that there is a reference of 'Last come first go' in the notice. However, the Housing Board ought to have seen who are the juniormost workmen working in the cadre of the persons working in the entire Housing Board. It is averred that there is no question of terminating the services of these persons as if there was a separate seniority list of the employees working at Bhavnagar. It is further contended that discriminatory treatment has been given and that the respondent No.2 - Corporation

ought to have agreed to accept the services of the persons referred in Annexure-A on the same terms and conditions of service. It is also averred that the order is in violation of Section 25-FF of the Industrial Disputes Act.

6. On behalf of the respondent, one J.K.Rasania, Deputy Executive Engineer filed an affidavit-in-reply in which it was inter alia pointed out that the persons were work-charge employees except the person at serial No.10, who was a muster roll employee. He has stated that as on 30.9.1986, the persons mentioned at Annexure-A were personally called and given notices and were also offered retrenchment compensation. They had refused to accept the notice or the compensation amount and therefore the notice and the demand draft of the amount of retrenchment compensation were sent by registered post A/D on 30.9.1986. It is pointed out that they were not appointed on regular basis. Their services were terminated in accordance with law. They were retrenched because they were the juniormost amongst the work-charge safai kamdars at Bhavnagar.

7. It appears that the petition was later on amended. The amendment has not been carried out and no relief whatsoever is claimed against the Corporation. On behalf of the Bhavnagar Municipal Corporation, one H.S.Patel, Drainage Engineer, has filed an affidavit pointing out that the services which have been undertaken by the Corporation under the agreement with the Housing Board were being carried out by safai kamdars who are the employees of the Corporation. There is no private contract given to a third party and he has specifically averred on oath that work was not available. So far as the work of septic-tank of the colony is concerned, it is pointed out that the said work was carried out by private contractor even during the time of Housing Board. It is under these circumstances, the disputes raised were required to be decided.

8. The learned Single Judge has conveyed that the persons mentioned at Annexure-A were discharging their duties of permanent nature under the Gujarat Housing Board and their services were made permanent by the Labour Court with retrospective effect and were treated as regular servants of the Municipal Corporation with regular pay. The learned advocate appearing for the respondent union fairly stated before us that there is no material before this Court to support this contention. It seems that the learned Single Judge relying on the decision of GURMAIL SINGH v. STATE OF PUNJAB reported in

AIR 1993 SC 1388 arrived at the conclusion that it is open for this Court to review the arrangement between the State Government and the Corporation and issue appropriate directions. The learned Single Judge further observed in para 10 as under:

> "Gujarat Housing Board has not expressly transferred the services of the aforesaid persons to the Corporation, but it will be deemed indirectly that their services have also been transferred to the Corporation as the work of the said persons were of permanent nature and that work was required to be done by the aforesaid persons or any other person."

The learned Single Judge further held in para 11 that work was available and therefore it was the duty of the Corporation to engage the aforesaid persons continuously, and further held that the action of the Corporation was also not justified in not engaging the persons mentioned in Annexure-A and the retrenchment of the aforesaid persons cannot be allowed at all and therefore held that the persons referred in Annexure-A are entitled to half backwages and directed the Municipal Corporation to take over the services of the persons mentioned at Annexure-A, allow them to work forthwith and to regularise the persons mentioned at Annexure-A of the petition with continuity of service in the regular pay scale as regular employees of the Corporation and further directed the Corporation to pay 50% of backwages from the date of termination, i.e. 1.10.1986 till they are allowed to work under its control.

9. Mr.Shelat, learned Additional Advocate General, submitted that the principle laid down in the case of GURMAIL SINGH (supra) would apply only if there is a fictitious transfer of an undertaking and one must be able to lift the veil or there is a transfer of an undertaking by the State to its own agency. In the instant case, there is no fictitious transfer. It is required to be noted that, in the instant case, both, namely, Bhavnagar Municipal Corporation and Gujarat Housing Board, are acting independently without being influenced by anyone, and as such there is no question of transfer of assets in the present case. There is no question of loss, if any, to the Corporation in future to be reimbursed by the Housing Board. The Corporation was not prepared to and has not accepted the workmen who were working with the Gujarat Housing Board and the workmen were already retrenched under Section 25-F of the Industrial Disputes Act. Keeping in mind these aspects,

one has to proceed with the matter. So far as the facts in the case of GURMAIL SINGH (supra) are concerned, it is very clear that the State Government had transferred tube-wells to the Corporation and the workmen, though retrenched by the State Government, their services were taken over by the Corporation. Under the circumstances, the question before the Court was of down-gradation in seniority and possible retrenchment of workmen pursuant to closing down of tube-wells. Before the Apex Court, there was a case of the State Government transferring tube-wells with an undertaking to recoup any loss. Thus, the Corporation which took over the tube-wells, in fact, was working on behalf of the State Government. It is under these circumstances, the Apex Court had taken the view that, in fact, the transferor and the transferee are both the State or the State instrumentality and both were bound to act at the behest of the State. In the facts and circumstances of the present case, the workmen are not absorbed and the transferee Corporation is refusing to absorb them specifically stating that work is not available and therefore there is no question of offering work to the workmen who were retrenched by the Gujarat Housing Board. The distinguishing features which we have pointed out hereinabove have been lost sight of by the learned Single Judge. It is required to be noted that the Apex Court in the case of GURMAIL SINGH (supra) pointed out as under:

> "It is open to a court in such a situation to give appropriate direction to ensure that no injustice results from the change-over. In the present case, the parties to the transfer are a State on the one hand and a fully owned State Corporation on the other. That is why we have examined the terms and conditions of the transfer and given appropriations to meet the needs of the situation."

10. We have indicated earlier that the Housing Board as well as the Municipal Corporation both are independent and are not working under the State. It is required to be noted that the Apex Court in the case of GURMAIL SINGH (supra) pointed out in para 16 that the Supreme Court itself has visualised a case and made it clear that if a transfer is fictitious or benami, Section 25-FF has no application at all. Of course, in such a case, "there has been no change of ownership or management and despite an apparent transfer, the transferor employer continues to be the real employer and there has to be continuity of service under the same terms and conditions of service as before and there can be no question of compensation." A

second type of cases which comes to mind is one in which there is in form, and perhaps also in law, a succession but the management continues to be in the hands of the same set of persons organised differently such as in BOMBAY GARAGE LTD. v. INDUSTRIAL TRIBUNAL. In the instant case, as pointed out above, neither of the situations mentioned in either of the cases arise. The learned advocate could not point out that the management is the same, or the management continues in the hands of the same set of persons. In fact, both are separate entities working under different statutes, discharging altogether different functions. In our opinion, the distinguishing features which we have indicated hereinabove are decisive.

11. In view of what we have stated hereinabove, the appeal stands allowed. The decision of the learned Single Judge in Special Civil Application No.5435 of 1986 is hereby quashed and set aside.

12. We take a note here of the valuable services rendered by the learned Additional Advocate General in this matter who was requested to assist the Court as an amicus curiae.

(KMG Thilake)

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